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# COMMENTS

## THE SURVIVAL OF A JURISPRUDENTIAL ANOMALY: THE DEAD MAN'S RULE IN WISCONSIN

### I. INTRODUCTION

Under the early English common law, it was well settled by 1680 that parties and other persons interested in the outcome of a civil lawsuit were disqualified from testifying on the basis of their interest in the outcome of the litigation. By this time the modern system of trial by jury and testimony by witnesses was well established. However, interested witnesses had not always been so disqualified. Medieval English law knew a mode of trial quite separate and distinct from modern trial by jury, that of "wager of law." Matters in issue were tried by the party's own oath assisted by compurgators or oath helpers. A person's oath was itself, therefore, a method of trial and not primarily a witness qualification.<sup>1</sup> A party and his compurgators were not disqualified from taking the oath by reason of any interest in the controversy. As a matter of fact the compurgators generally had some kind of interest in the outcome and in addition they were usually relatives or friends of the party who called them. Nevertheless it was not felt that there was any impropriety in such a person assisting with his oath the cause of a party. The jury was not limited to the courtroom or what it found there. It could go out and investigate for itself. This fact was true even after the beginning of the modern jury trial system, where the witness testified under an oath which became a method of witness qualification rather than a method of trial itself. However, once the point was reached where the jury stopped going out to investigate for itself, leaving it to the witnesses to furnish the information needed, the modern objection to interested testimony began to resolve itself. The theory was that there was a strong likelihood of a party perjuring himself in his own behalf; that since a party is naturally prone toward perjury, an impossible burden would be imposed on the jury in its attempt to determine the veracity of the testimony; that since the jury could not look into the mind of the witness in order to determine to what extent his interest was influencing his testimony, it would be more prudent to exclude the testimony altogether by making a party an incompetent witness.<sup>2</sup> In the words of Sir Edward Coke:

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<sup>1</sup> 2 WIGMORE, EVIDENCE §575 (3rd ed. 1940); 9 HOLDSWORTH, HISTORY OF ENGLAW 194 (1926); *Lectures on Particular Phases of the Law of Evidence*, by the Honorable John D. Wickhem, former Wisconsin Supreme Court Justice, before the Dane County Bar Association, 80-81 (1939-40) (hereinafter cited as WICKHEM'S LECTURES).

<sup>2</sup> See WICKHEM'S LECTURES 81-83.

Experience proves that men's consciences grow so large that the respect of their private advantage rather induces men (and chiefly those who have declining estates) to perjury.<sup>3</sup>

Coke's influence largely determined why the party disqualification was later extended to all persons interested in the lawsuit.<sup>4</sup> The settlement of the American colonies resulted in the disqualification becoming part of the common law in the United States.

So strongly embedded was this distrust of testimony by a person interested in the outcome of a lawsuit that many years elapsed before the struggle to change the rule finally succeeded. The abuses attending the entire exclusion of interested testimony must have been tremendous, though, of course, a statistical survey, shedding any light on how many times honest claimants and defendants were deprived of their just due, was never taken.<sup>5</sup> One of the most significant developments in Nineteenth century jurisprudence was the breaking down of the barriers, first as to parties, and later as to other interested witnesses as well. The rule was abolished first in England<sup>6</sup> and then in the United States. Michigan led the way in 1843<sup>7</sup> and New York and other states followed. In every jurisdiction under our law, interest as a disqualification has expressly been abolished.<sup>8</sup> When reform was first proposed in New York, the New York Commissioners on practice and pleading stated:

The rule appears to us to rest upon a principle altogether unsound; that is that the situation of the witness will tempt him to perjury. The reason strikes at the foundation of human testimony. The only just inquiry is this; whether the chances of obtaining truth are greater from the admission or the exclusion of the witness. Who that has any respect for the society in which he lives can doubt, that upon this principle, the witness should be admitted? The contrary rule implies that in the majority of instances men are so corrupted by their interest, that they will perjure themselves for it, and besides being corrupt, they will be so adroit as to deceive the courts and the juries. This is contrary to all experience. In the great majority of instances witnesses are honest, however much interested, and in most cases of dishonesty, the falsehood of the testimony is detected and deceives none. Absolutely to exclude an interested witness is therefore as unsound in theory as it is inconsistent in practice . . . It [the reforming statute] . . . sweeps away the numberless nice and subtle distinctions in which the profession was wont to luxuriate; disencumbers our jurisprudence of a heavy load of useless decisions resting upon refinements not principles . . .

<sup>3</sup> Slade's Case (1602) 4 Co. Rep. @ f. 95 a.

<sup>4</sup> 9 HOLDSWORTH, *supra* note 1, at 195.

<sup>5</sup> See Bobbe, *The Uncontradicted Testimony of an Interested Witness*, 20 CORNELL L. Q. 33 (1934).

<sup>6</sup> Evidence Act of 1843 (Lord Denman's Act), 6 & 7 Vict., C. 85.

<sup>7</sup> MICH. REV. STAT. C. 102 §99 (1846).

<sup>8</sup> See 2 WIGMORE, *supra* note 1, §488 n. 2, where the statutes are collected.

There have been few greater improvements in our judicial system, than those which are effected by this valuable statute.<sup>9</sup>

Nevertheless while interest no longer remains a basis for complete disqualification of the witness, it is still a factor which the trier of fact considers in determining his credibility.<sup>10</sup> To this extent, at least, Coke's admonition has not been forgotten, although the stringency of his solution to the problem has been rejected in a more enlightened era in which the unjust results of total exclusion are apparent.

## II. THE DEADMAN'S RULE AS THE LAST RELIC OF THE DISQUALIFICATION BY INTEREST RULE

In practically every jurisdiction in the United States where a statute eliminating the common law disqualification by interest rule was enacted, one exception has been retained which perpetuates the principle of the discarded rule within a limited area. This exception prohibits the testimony of a survivor as to a transaction with a deceased person when it is offered against the latter's estate.<sup>11</sup> The purpose of this rule, commonly referred to as the "deadman's rule" was expressed by Mr. Justice Hammond of the West Virginia Supreme Court in the often cited case of *Owens v. Owens*.<sup>12</sup>

. . . The law in the exception of the privilege to testify was intended to prevent an undue advantage on the part of the living over the dead, who cannot confront the survivor or give his version of the affair, or expose the omission, mistakes or perhaps the falsehoods of such survivor. The temptation to falsehood and concealment in such cases is considered too great to allow the surviving party to testify in his own behalf. Any other view of this subject, I think, would place in great peril the estates of the dead, and would in fact make them an easy prey for the dishonest and unscrupulous . . .

The purpose of this comment is not to deal with the scope of individual statutes in various jurisdictions, since while they all appear to retain a portion of the common law disqualification in force, in actuality there is a great variance between the situations to which the exclusions are applicable. They not only vary greatly in phraseology, but the attitudes of courts differ as to whether they should be liberally or strictly applied. The result is that the precedents in one jurisdiction are of little value in another. Rather, this comment will deal with the Wisconsin statutory exclusion, its rationale and some of its interpretations. The purpose here is to demonstrate first that the rationale underlying the exclusion of the testimony of an interested survivor in Wis-

<sup>9</sup> FIRST REPORT OF NEW YORK COMMISSIONERS ON PRACTICE & PLEADING 246 (1848).

<sup>10</sup> See 3 WIGMORE, *supra* note 1, §966 n. 1 where the statutes are listed.

<sup>11</sup> See 2 WIGMORE, *ibid*, §488 n. 2 where the statutes are collected; and 5 JONES, COMMENTARIES ON EVIDENCE §2222 *et. seq.* (1926).

<sup>12</sup> 14 W. VA. 88, 95 (1878).

consin is unsound (as it is in every other jurisdiction) and second, that even if the rationale of the exclusion were sound, it cannot be demonstrated that the Wisconsin statute achieves its purpose of protecting the estates of deceased persons against the possibility of perjured testimony. On the contrary, not only it is likely that the estates of deceased persons have been despoiled to the same degree were the statute non-existent, but in addition, what despoilation that has been prevented by operation of the statute has been offset by the disallowance of honest claims.

### III. THE WISCONSIN STATUTORY EXCLUSION

In 1858 Wisconsin eliminated by statute the disqualification by interest rule of the common law.<sup>13</sup> At the same time the first dead man's statute was enacted.<sup>14</sup> The original dead man's statute was an outright retention of the common law disqualification within the area of a certain class of actions. It prohibited a party from testifying at all in an action wherein the opposite party sued or defended as the executor or administrator of a deceased's estate, or where he claimed as an assignee of a deceased assignor or as a principal of a deceased agent. The disqualification was based on the identity of the opposite party, not upon what the survivor was attempting to testify to. This was apparently an unsatisfactory exclusion however, for in 1868 the law was modified in the direction of the modern law in Wisconsin. The prohibition was broadened in the sense that it was extended to any type of action, but limited in the sense that it applied only where the parties or other interested persons attempted to testify to a transaction or communication with a deceased person.<sup>15</sup> In 1901 the statute was refined further. The disqualification was limited to situations where a person attempted to testify to a transaction with a deceased in his own behalf or interest.<sup>16</sup> This allowed in testimony of an interested providing it was not directed toward his own interest. In 1907, trustees, stockholders and officers of a corporation testifying on its behalf were disqualified the same as other persons.<sup>17</sup> The statute had then assumed its modern substance and exists substantially unchanged today.

No party or person in his own behalf or interest, and no person from, through or under whom a party derives his interest or title, shall be examined as a witness in respect to any communication by him personally with a deceased or insane person in any civil action or proceeding, in which the opposite party derives his title or sustains his liability to the cause of action from, through or under such deceased or insane person is a party prosecuting or defending by guardian, unless such opposite party

<sup>13</sup> WIS. REV. STAT. c. 137, §50 (1858).

<sup>14</sup> WIS. REV. STAT. c. 137, §51 (1858).

<sup>15</sup> WIS. LAWS 1868, c. 176.

<sup>16</sup> WIS. LAWS 1901, c. 181, §1.

<sup>17</sup> WIS. LAWS 1907, c. 197.

shall first, in his own behalf introduce testimony of himself or some other person concerning such transaction or communication, and then only in respect to such transaction or communication to which such testimony relates. And no stockholder, officer or trustee of a corporation, from, through or under whom a party derives his or its interest or title shall be so examined as aforesaid.<sup>18</sup>

A. *The Rationale of the Wisconsin Statutory Exclusion*

In *Will of Repush*,<sup>19</sup> one of the three subscribing witnesses to an alleged noncupative will was held incompetent to testify as to its execution by the Testatrix. The will failed, there being a lack of the requisite number of witnesses. The witness was not allowed to testify because if the will were proved he would have been the sole legatee. Said the court:

The purpose of the statute is to prevent parties to a transaction from obtaining an unfair advantage over another party who has since died. The lips of one being sealed by death, the lips of the other are sealed by a rule of law which, though arbitrary is made necessary to prevent greed and avarice from enabling the survivor to perpetrate a fraud. Occasionally this works a hardship. Revocation of relaxation of the rule would open the door to fraud and work more and greater hardships. The deceased is entitled to be protected against misquotation of his own words as well as the purported statements of the witness' words to him during his lifetime.<sup>20</sup>

*Repush* indicates that there are two reasons why the testimony of an interested survivor is excluded. The first is that since he is interested, he is untrustworthy. The second is that since the deceased is unable to rebut or modify the survivor's testimony, in fairness to the deceased and his estate the survivor's lips should also be closed. Insofar as the disqualification is based on interest it is open to the same objections that were successfully levelled against the interest rule in general at common law, namely, that in the majority of instances men are not so corrupt that they will perjure themselves for their own interests and that insofar as the witness would testify truthfully, exclusion is an intolerable injustice. Therefore if the exclusion has a valid *raison d'être*, it would have to be the fairness proposition. Insofar as the exclusion is based on fairness, it presumes that a perjurer will be so adroit as to successfully run the gamut of cross-examination and deceive the court or jury. This is questionable. Moreover, the deceased opponent, who if he were alive would be a party, would also be a potential liar equally with the disqualified survivor. The fairness proposition appears to rest on the unavailability of a questionable species of testimony

<sup>18</sup> WIS. STAT. §325.16 (1957). See also §325.17 as to transactions with a deceased agent in which the principle involved is substantially the same as in §325.16.

<sup>19</sup> 257 Wis. 528, 44 N.W. 2d 240 (1950).

<sup>20</sup> *Ibid.*, at 531.

equally weak with that which is excluded!<sup>21</sup> In addition, if the interest element is removed from consideration of the fairness proposition, the following conclusion results: If it is so unfair to allow damaging testimony to be offered against the estate of a person who because of his death is in no position to rebut, then the exclusion should extend as well to a disinterested witness offering unfavorable testimony. No rule of evidence, however, supports such a proposal. Further, no rule of evidence requires exclusion of damaging testimony of either a disinterested or an interested witness simply because the other party is unable to offer evidence in rebuttal, when such inability is due to any other reason besides the death of his rebutting witness. Why make an exception when the inability to rebut is due to the witness' death?

Separate consideration of the interest proposition and the fairness proposition demonstrate their unsoundness as valid reasons for the rule. Mix interest with inability to rebut due to death, however, and the court finds a reaction producing exclusion. Nevertheless, on the basis of its rationale, the rule should be condemned, and in fact, has been soundly disapproved.<sup>22</sup>

#### B. *The Wisconsin Statutory Exclusion in Operation*

Even if it can be assumed that the witness will be corrupted by his interest and that it is unfair to let him testify since the deceased person cannot rebut, the problem of framing a statutory exclusion which is logically and practically sound is particularly acute. In addition, it is impossible to demonstrate that the statute is fulfilling its supposed purpose in any given instance, namely, protecting the estates of deceased persons by testimonial trustworthiness of the witness. Each time the statute is applied, there also looms the frightening possibility that a clever perjurer is utilizing for his own ends, its non-application on the basis of some technicality.

And it is a pity—perhaps if the theory of it is valid, the statute is the best you can do—but it does seem a pity [that] such philosophy, if it is right, has to be vindicated by a statute that offers so many difficulties of construction.<sup>23</sup>

There are three areas in particular in which the achievement of just results under the statute are undemonstrable.

##### 1. *When is a witness testifying in his own behalf or interest?*

The statute begins by prohibiting the testimony of a witness when it is offered in "his own behalf or interest." The statute does not state explicitly when it is that a person is testifying in his own interest, and

<sup>21</sup> 2 WIGMORE, *supra* note 1, §578, at 696.

<sup>22</sup> *Ibid.* at 697; See also The Report of the New York Commonwealth Fund Committee entitled THE LAW OF EVIDENCE: SOME PROPOSALS FOR ITS REFORM 23-35 (1927).

<sup>23</sup> WICKHEM'S LECTURES at 94.

obviously the legislative process is clearly unsuited toward drawing a clear cut line of delineation. In this area the distinctions of case-by-case adjudication have made the law. The statute has been held to apply generally to the testimony of persons interested in an estate which is the subject of litigation in probate proceedings. For instance, a legatee attempting to establish a last will cannot testify as to conversations she had with the testatrix concerning the disposition of testatrix's property in a manner favorable to the legatee.<sup>24</sup> An heir who would benefit by the revocation of a will cannot testify as to the revocation.<sup>25</sup> A subscribing witness, who, if the alleged nuncupative will were proved, would be the sole legatee, could not testify as to the act of the execution by the testatrix.<sup>26</sup> Note here that in each of these cases the witness not only had a direct legal interest in the outcome of the suit, but the testimony obviously was in the witness' interest. However, where the testimony is not in the witness' interest, it can go in. Therefore a subscribing witness who was also the residuary legatee, was allowed to testify as to the execution of the will by the testator, since as a result of allowing her testimony in she lost her legacy by operation of the statutes.<sup>27</sup>

However, a problem now arises. How far out along the range of small graduations of interest do you go to reach the point where the prospects of potential perjury diminish to such a degree in the court's opinion, that it will allow the testimony to come in? To illustrate: A provision in a will appointing the attorney who drafted it as executor and fixing his compensation at \$200, which sum was small considering the size of the estate, did not disqualify him from being a subscribing

<sup>24</sup> *Goerke v. Goerke*, 80 Wis. 516, 50 N.W. 345 (1891); *Will of Pullen*, 166 Wis. 254, 165 N.W. 25 (1917).

<sup>25</sup> *In re Valentine's Will*, 93 Wis. 45, 67 N.W. 12 (1896).

<sup>26</sup> *Will of Repush*, *supra* note 19.

<sup>27</sup> *Estate of Johnson*, 170 Wis. 436, 175 N.W. 917 (1920). In the *Johnson* case the court concluded that even if the act of attesting the will were a transaction with a deceased, nevertheless, it is saved from the statute by being a subject of special consideration in the separate chapter on wills. §2282 of the Statutes in effect when the will was executed required attestation and subscription by at least two competent witnesses, (unless the will were nuncupative) for validity. The argument that Mr. Hahn was an incompetent witness was respected by the court by virtue of the fact that §2284 made gifts to a subscribing witness void unless there were at least two other subscribing witnesses. This showed the legislative intent only to void the gift but not at the same time to make the witness incompetent, even though there was no express provision in §2284 allowing in such testimony as there had been in the predecessor section. However, in the *Repush* case, the court refused to follow the rule in the *Johnson* case. The reason is not clear, but since apparently, the will being nuncupative, the gift to the sole legatee who was also a subscribing witness would not have been void by virtue of §238.08 which validates gifts to subscribing witnesses of any will where there are at least two other subscribing witnesses. In this case there were three. Therefore had the court allowed Joe Repush to testify, the will would have been proved under §238.16 and by virtue of §238.08, Joe would have also taken under the will as sole legatee. Thus his testimony was offered in his own "behalf or interest" whereas Mr. Hahn in the *Johnson* case was not so testifying.



witness to the will.<sup>28</sup> An executor who appears as a proponent of the will in a contested probate proceeding, is a competent witness, since his compensation is a *quid pro quo* for services rendered, and he apparently stands to gain or lose nothing whether the will is upheld or not.<sup>29</sup> A mother was competent to testify as to the making of a contract with the deceased whereby he agreed to leave her child a legacy if the deceased and his wife were allowed to bring up the child, since the mother, having no legal duty (at that time) to support the child, stood to gain nothing by the transaction.<sup>30</sup> The parents of a plaintiff child in a malpractice action could testify as to conversations with the doctor, since deceased, taking place during the course of treatment of the child, since not being parties to the action or having any financial or pecuniary interest in the result thereof, they were competent witnesses.<sup>31</sup> A plaintiff's wife was competent to testify to damaging statements made by the defendant driver, since deceased, to her immediately after the automobile collision, since she was neither a party to the action nor would she secure any direct benefits therefrom.<sup>32</sup> An insurance agent could testify that he agreed with the insured, now deceased, to insure the barn that was not blown down by a windstorm, when the issue was as to which of the two barns the policy covered, since he had no legal interest in the outcome of the litigation. However, had the suit been one for rescission of the policy, then he would have been an incompetent witness since he stood to lose his commission.<sup>33</sup> On the other hand, the wife of an executor was not allowed to testify that a testatrix made a gift of \$1,500 to her and her husband jointly, since she was testifying in her own interest. However, had she and her husband taken the position that the alleged gift was to him alone, then she would have been a competent witness.<sup>34</sup>

... You can argue till the cows come home whether a particular decision has properly construed the statute, but even if it has, isn't it very frequently a question under this act as to whether the statute properly construed may not draw a perfectly arbitrary line between things that may be let in and things that may be left out, when this general principle covers one situation just about as well as another . . .<sup>35</sup>

It apparently is well nigh on to impossible to determine whether the above decisions correctly interpret the statute. By its broad termi-

<sup>28</sup> Will of Henderson, 272 Wis. 163, 74 N.W. 739 (1956).

<sup>29</sup> Anderson v. Laugen, 122 Wis. 57, 99 N.W. 437 (1904); Estate of Novak, 181 Wis. 16, 193 N.W. 1000 (1923); Will of Williams, 256 Wis. 338, 41 N.W. 2d 191 (1949).

<sup>30</sup> Dilger v. Estate of McQuade, 158 Wis. 328, 148 N.W. 1085 (1914).

<sup>31</sup> Nelson v. Ziegler, 196 Wis. 426, 220 N.W. 194 (1928).

<sup>32</sup> Carlson v. Hardware Mutual Casualty Co., 255 Wis. 407, 39 N.W. 2d 442 (1949).

<sup>33</sup> Nolan v. Standard Fire Ins. Co., 243 Wis. 30, 9 N.W. 2d 74 (1943).

<sup>34</sup> Estate of Southward, 208 Wis. 150, 242 N.W. 584 (1932).

<sup>35</sup> WICKHEM'S LECTURES at 89.

nology it leaves the determination of when a witness is testifying in his own behalf or interest almost completely to the court's discretion. The question is, then, to determine how the court is exercising that discretion, with a view toward achieving a just result in the case at hand, and setting a precedent for future similar fact situations. It is in this light that the validity of the application or non-application of the statute in a particular fact situation should be measured.

How does the court go about exercising its discretion? Take for example the above situation where a mother was allowed to testify as to the making of a contract with the deceased wherein he promised to leave a legacy to her daughter. Does the court feel that because of the indirect nature of the mother's interest, here merely her affection for her daughter and her desire to see her daughter obtain a windfall, the chances are pretty good that she will tell the truth? That possibly 90 out of 100 mothers in a similar situation are testimonially trustworthy and that therefore this particular mother can testify and a precedent can be set? If so, this is a small consolation to the deceased, if in fact, this mother is one of the 10 who would perjure themselves. Further, the next nine mothers who come along may be clever perjurers who are now allowed to testify because the rule now works in their favor. On the other side of the coin, a sole legatee above could not testify as a subscribing witness to the will because of his direct and large pecuniary interest. On the basis of the above reasoning, the court apparently feels the chances are pretty poor that he will tell the truth, say, only 50 out of 100. Therefore this particular legatee cannot testify. This is a small consolation to the legatee if he is in fact one of the 50 who will tell the truth. Likewise it is of small consolation, once the precedent has been set, to the next 49 legatees who come along assuming they are the truthful ones. All this, of course, assumes a direct correlation between the magnitude and directness of the interest, and the perversity of human nature. Even if this highly questionable assumption were valid, the injustice in such an approach is obvious. When it is considered that the odds in favor of perjured testimony on the basis of human experience are not in direct correlation with the magnitude of the interest, in cases where the exclusion is applied, for example the legatee situation above, the chances are that many more than 50 out of 100 honest witnesses will be deprived of the opportunity to tell the truth and injustice is thereby compounded.

However, there is one salvation. If in the fact, the court does not determine the applicability of the rule primarily on the basis of its idea of what the odds in the aggregate are in favor of perjured testimony, but in addition passes unconscious judgment on the credibility on this particular individual witness before making a decision as to whether the rule should apply, then, at least, something approximating

a logical and just result can be achieved in a particular case, the first time that type of fact situation arises. It seems likely that this is in fact what the court actually does in the interest area of the statute. Justice can then prevail, at least until the next time a fact situation on all fours arises. Then, of course, a precedent based primarily on the credibility of a particular witness in a prior case is valueless in a subsequent case where the personal impression of the witness on the court may differ, and insofar as the court would follow the precedent based on the doctrine of *stare decisis* alone, the door is opened to injustice.

2. *What constitutes a transaction or communication with a Deceased Person?*

Once it has been determined that the testimony offered by the witness is in his own behalf or interest to a prohibited degree, the next step is to determine whether the transaction with the deceased is of a disqualifying kind. In Wisconsin, the transaction must be a "mutual transaction" between the deceased and the witness who survives, in which both the survivor as well as the deceased actively participated.<sup>36</sup> The words "by him personally" appearing in the statute immediately following the words "transaction or communication" qualify the latter words wherever they thereafter appear in the statute.<sup>37</sup> The problem here is to determine what constitutes the type of mutual or personal transaction which falls within the prohibition of the statute. Like the "interest" provision of the statute, the "transaction" provision is phrased most generally, except as qualified by the word "personal." As in the interest area, the distinctions of case-by-case adjudication have made the law.

A party can testify as to the receipt of a letter from a person, since deceased, since the receipt is not a transaction or communication within the meaning of the statute which contemplates a face-to-face transaction by the parties in the presence of each other.<sup>38</sup> However, this is providing he is able to produce the letter at the trial. If he cannot produce it and claims it is lost, he cannot testify as to its contents since the sending of the letter by the deceased and its receipt by the witness then becomes a prohibited transaction or communication.<sup>39</sup> The reason given is that if the witness could testify, there would be no security against his fraudulently claiming a lost letter. However, even where the witness is able to produce the letter, where is the assurance that the deceased party ever wrote it? The deceased person is not able to deny writing it and it well may be that his estate will be despoiled through

<sup>36</sup> *Krantz v. Krantz*, 211 Wis. 249, 248 N.W. 155 (1933).

<sup>37</sup> *Pick Foundry Inc. v. General Door Mfg. Co.*, 262 Wis. 311, 55 N.W. 2d 407 (1952).

<sup>38</sup> *Daniels v. Foster*, 26 Wis. 686 (1870); See also *Estate of Menzer*, 189 Wis. 340, 207 N.W. 703 (1926).

<sup>39</sup> *Felz v. Estate of Felz*, 170 Wis. 550, 174 N.W. 908 (1920).

the medium of a clever forgery. Is the real distinction between these two cases the fact that the court felt that in one the witness was credible and in the other he was not? Otherwise, how can it be said that there really is a distinction here; that the non-availability of a letter at the time of trial alters the nature of a prior transaction from one that is not personal to one that is?

A wife could not testify as to her possession of a bankbook where the issue was whether or not her husband, since deceased, had made her a gift of the account. Since she would have been incompetent to testify to his act of delivery to her, she was also incompetent to testify to the fact of her possession from which delivery by her husband could be inferred.<sup>40</sup> However, a father could testify that the keys to a joint safe deposit box leased in his and the son's names had never been in the son's possession, in order to establish that the contents of the box had never been delivered to the son.<sup>41</sup> The distinction between the two cases apparently is that if the deceased ever had possession at one time, then allowing in testimony as to the survivor's testimony raises an inference of delivery. However if the deceased never had possession, then testimony as to the survivor's possession negatives any inference of a transaction involving delivery. However, the question is whether such a distinction is really consistent with the purpose of the rule. Why forbid testimony of a personal transaction in one case which in effect is no more damaging to the estate than testimony concerning the *non-existence* of a personal transaction in the other? In one case the witness affirms a transaction with the deceased, in the other he denies it. In either case his interest supposedly makes him prone to perjury and the deceased person cannot rebut him. Or was this another credibility-of-the-witness distinction?

The cases appear to be unanimously in favor of allowing a claimant to testify to the nature of the services he rendered the deceased and their value.<sup>42</sup> The rationale is that the witness is testifying to the independent fact of what he did and not to the making of a contract with the deceased which would be a prohibited transaction or communication. However, a mortgagor cannot testify as to his act of payment to the mortgagee, now deceased.<sup>43</sup> In either situation however, the witness only wants to testify as to what he *did*, yet in one situation he is competent; in the other he is not.<sup>44</sup>

<sup>40</sup> Estate of Krause, 241 Wis. 41, 4 N.W. 2d 122 (1942).

<sup>41</sup> McComb v. McComb, 204 Wis. 293, 234 N.W. 707 (1931).

<sup>42</sup> Pritchard v. Pritchard, 69 Wis. 373, 34 N.W. 506 (1887); Belden v. Scott 65 Wis. 425, 27 N.W. 356 (1886); In re Kessler's Estate, 87 Wis. 660, 59 N.W. 129 (1894); Bossi's Estate v. Baehr, 133 Wis. 119, 113 N.W. 433 (1907); Gardner v. Young's Estate, 163 Wis. 241, 157 N.W. 787 (1916); In re Fuller's Will, 190 Wis. 445, 209 N.W. 683 (1926); Kirkpatrick v. Milks, 257 Wis. 549, 44 N.W. 2d 574 (1950).

<sup>43</sup> Jackson v. Inman, 137 Wis. 20, 118 N.W. 189 (1908).

<sup>44</sup> See WICKHEM'S LECTURES at 92 and 93.

An injured pedestrian could not testify that she called out to a truckdriver, since deceased, to wait while she passed in front of the truck, but instead the truck started up suddenly and injured her.<sup>45</sup> A plaintiff guest injured in an automobile accident could not testify that she protested to her host that he was driving too fast in an action against his estate where her assumption of risk was at issue.<sup>46</sup> However in an action against a deceased's estate arising out of another automobile collision, the injured plaintiff was allowed to testify concerning the movements of the automobile driven by the deceased driver.<sup>47</sup>

... We think the transaction meant in Sec. 325.16 is a personal transaction with a deceased, a transaction in which each is an active participant, and that it does not prevent the survivor from describing an event or physical situation, or the movements or actions of a deceased person quite independent and apart and in no way connected with or prompted or influenced by reason of the conduct of the party testifying. The transaction mentioned in Sec. 325.16 means a mutual transaction between the deceased and the surviving party, one in which they both actively participated...<sup>48</sup>

On this theory an injured guest was allowed to testify in an action against the estate of his deceased host in the negligent operation of the host's automobile, as to his observations, description of the physical situation and the driver's movements and actions in operating and controlling the automobile.<sup>49</sup> A mere bystander who does not participate in or influence a transaction between the deceased and a third party can testify to it, even though he is interested in the outcome of the suit.<sup>50</sup>

Who can say whether these decisions and the distinctions they draw correctly interpret the statute. As in the interest area, it will be assumed that they do correctly interpret it. Nevertheless, do these decisions and the distinctions they draw, even if correct, demonstrate that the statute succeeds in its purpose? Are the estates of deceased persons really protected from perjury by letting the survivor to the transaction testify as to what he or the deceased said? Is it consistent to allow the interested bystander to testify as to what the deceased said or did simply because the bystander did not enter into the transaction actively or influence it? It seems that in any case the inclination towards perjury should still be there assuming the validity of the interest rationale and the fact that the deceased is not available to rebut the survivor's testimony. On the other hand where the testimony was prohibited, we are still haunted with the spectre of the frustrated claimant.

<sup>45</sup> *Jacksons-Peterson v. D. Rick & Sons Co.*, 240 Wis. 197, 2 N.W. 2d 873 (1942).

<sup>46</sup> *Waters v. Markham*, 204 Wis. 249, 235 N.W. 797 (1931).

<sup>47</sup> *Seligman v. Hammond*, 205 Wis. 199, 236 N.W. 115 (1931).

<sup>48</sup> *Ibid.*, at 206.

<sup>49</sup> *Krantz v. Krantz*, *supra* note 36.

<sup>50</sup> *In re Laugen's Will*, 122 Wis. 57, 99 N.W. 437 (1904); *Flanagan v. Flanagan's Estate*, 169 Wis. 537, 173 N.W. 297 (1919).

3. *What is the effect where the opposite party does not derive his claim or sustain his liability through the deceased?*

A party or other interested witness cannot testify as to a personal transaction with a deceased person where the opposite party derives his title or sustains his liability under the deceased, as for example, where he is the administrator of the deceased's estate. However, absent this element and the disqualification evaporates. Although it appears that in this area it should be relatively easy to determine when the opposite party in fact derives his interest under the deceased, there has been a problem of interpretation. Even where there is no problem of interpretation, the results reached considering the type of thinking which prompted the statute in the first place are inconsistent with that thinking.

In an action involving suit by a wife against her son and his insurer for the wrongful death of her husband resulting from the son's negligent operation of the automobile in which his father was riding as a guest passenger, the son's defense was that his father assumed the risk. The son was competent to testify that when he cut out to pass another car on a hill, his father made no protest or outcry.<sup>51</sup> The reason given for the competency of the son's testimony was that the opposite party, the wife, did not derive her cause of action through the deceased, who has no cause of action for his own death, but rather, under the wrongful death statute,<sup>52</sup> which creates and vests in her personally a cause of action and does not devolve a cause of action on the deceased and thence through him to her. It is not debatable that such is a proper interpretation of the devolution of her cause of action. However, from the standpoint of what the testimony concerned, how does this situation differ essentially from the one where the injured guest was prohibited from testifying that she protested the rate of speed at which her deceased host was driving?<sup>53</sup> It is true that in that situation her testimony was directed against the estate of a deceased person and therefore flew directly into the teeth of the statute. Here there is no danger of spoliation of a decedent's estate. Whether the wife wins or loses is immaterial to the decedent's estate which has no claim to the cause of action. Nevertheless, assuming that witnesses are prone to perjury because interested and because the decedent cannot rebut, there is still the probability of perjury. This time, however, potential perjury can be used to defeat an honest claim. Since the witness can testify, the statute which supposedly was designed to eliminate the possibility of spoliation of the estates of deceased persons now becomes an instrument which allows in testimony, the veracity of which is highly doubtful, assuming our twin rationale to be true, simply because it is not levelled directly

<sup>51</sup> *Olsen v. State Farm Mutual Ins. Co.*, 252 Wis. 37, 30 N.W. 2d 196 (1947).

<sup>52</sup> WIS. STATS. §§331.03 and 331.04 (1957).

<sup>53</sup> *Waters v. Markham*, *supra* note 46.

against the estate of a deceased person. It seems that in the sense that a potentially just claim on the part of the wife is being jeopardized by the fact that the deceased is not able to rebut or modify the defendant's testimony pertaining to the deceased's assumption of risk, the statute operates inconsistently considering its rationale. In logic and fairness, why should the statutes operate to protect a decedent's estate from spoliation by excluding certain testimony, when testimony of the exact same nature and from a similar source is allowed in to operate against the claim of a living person who takes exactly the same risk that the witness is committing perjury.

A wife could testify as to a conversation between her deceased husband and an insurance agent relative to the making of a contract of insurance naming her as beneficiary, where the company denied the policy was in effect when her husband died. The reason given is that the opposite party, the company, does not derive its liability through the deceased, but through its contract with him.<sup>54</sup> In an action under the workman's compensation statutes by a wife for the death of her husband, the secretary of the company in which the husband was doing some work was competent to testify as to conversations with the deceased indicating that he was in fact an independent contractor and not an employee, which of course meant the widow would have no statutory claim. The secretary could testify because the opposite party, the wife, derived her cause of action under the statute and not through the deceased.<sup>55</sup> However, a husband was not allowed to testify that he and his wife agreed that a joint bank account in both their names was erected solely for his convenience and that she was not allowed to have any interest therein.<sup>56</sup> The state of Wisconsin was attempting to levy an inheritance tax on the wife's half and the husband argued that the state did not claim through the deceased, but under its power to tax derived from the inheritance tax statutes, and that therefore he was a competent witness. The court rejected this argument, however, distinguishing the situation from one under the Workman's compensation statutes. The court felt that here the wife in reality had such an interest in the subject matter of the controversy that she could have sued during her lifetime, since what the husband was actually doing here was attempting to reform the evidence of title to the account. Therefore the state, in effect, stood in her place and derived its claim through her.<sup>57</sup> The husband then ultimately was disqualified because his testimony, in this technical sense, was directed against the estate of a decedent.

<sup>54</sup> *Chamberlain v. Prudential Ins. Co.*, 109 Wis. 4, 85 N.W. 128 (1901).

<sup>55</sup> *J. Romberger Co. v. Industrial Commission*, 234 Wis. 236, 290 N.W. 639 (1940).

<sup>56</sup> *In re Hounsell's Estate*, 252 Wis. 138, 31 N.W. 2d 203 (1947).

<sup>57</sup> But see Justice Currie's comment on this analysis in Currie, *Transactions with a Deceased Person*, 1948 Wis. L. Rev. 491, at 502.

Is this situation really distinguishable from one involving a claim under the workman's compensation statute? A joint tenant has a property interest in the subject matter of the joint tenancy only while alive. After his death his interest passes to the other joint tenant by right of survivorship so for all practical purposes it shouldn't make any difference to the estate of the decedent whether the survivor now attempts to reform the title or not, since the survivor has undisputed title, whether as surviving joint tenant or as sole owner originally. On the other hand the state does not acquire an interest in the subject matter under the inheritance tax statutes until the death of the joint tenant. It comes into the picture at the exact moment that it becomes completely immaterial to the deceased whether the survivor attempts to reform the evidence of title or not. In this sense can it be said that the state stands in the place of the deceased and derives its claim through her? Or did the court once again, strain to find a distinction because of its impression of the credibility of the witness, in this case, an unfavorable impression.

#### IV. CONCLUSION

It is submitted that this last relic of the old common law disqualification by interest rule as expressed in Wisconsin Statutes Secs. 325.16 and .17 be abolished. The statutes appear to show legislative dissatisfaction with the old disqualification rule but are an attempt to compromise without doing away with the rule altogether. However, the dead man's exception to the abolition of the disqualification because of interest rule appears to be unsound, both as to the interest and the fairness propositions upon which it rests. Even assuming the theory of the rule has some validity, it cannot be demonstrated that the statutes as they now exist bear a reasonable relationship to the production of just results, and that in the last analysis it appears that the credibility of the particular witness influences the court to a large degree in determining whether or not his testimony fits within the statute. It is recommended therefore that legislation along the lines of the following statute, which was recommended on February 22, 1940, by the State Bar Association, be adopted:

No person shall be disqualified as a witness in any action, suit, or proceeding, by reason of his interest in the event of same as a party or otherwise.

In actions, suits or proceedings by or against the representatives of deceased persons, including proceedings for the probate of wills, any statement of the deceased, whether oral or written, shall not be excluded as hearsay provided the trial judge shall first find as a fact that the statement was made by the decedent, and that it was made in good faith and on the decedent's personal knowledge.<sup>58</sup>

<sup>58</sup> See Justice Currie's approval of the proposed legislation. *Id.* at 506; See also Justice Wickhem's comment in WICKHEM'S LECTURES 95-98.



In effect, legislation of this type would formally codify the actual practice of the courts as it now exists. The trial judge, who is most competent to do so, would pass on the credibility and other corroborating evidence, and if he were satisfied that the deceased person actually made the statement, the testimony of the witness could go into evidence and the trier of fact could place whatever weight it wanted on the testimony, taking into account the witness' interest. This appears to be a more straightforward system than paying lip service to the artificial provisions of the existing statute with the resultant series of sometimes incomprehensible distinctions, which become comprehensible only if it is realized that the courts are in effect allowing their impression of the witness' credibility to effect their determinations as to whether the rule should apply in any given instance.

In addition, to prevent such legislation from becoming an instrument for perjury in the hands of an unscrupulous few, it might be prudent to require corroborating evidence in addition to the testimony of the survivor as a prerequisite for recovery. Several states have enacted statutes which so require.<sup>59</sup> However, Wigmore feels that such statutes represent only a half-way measure based on the same rationale as the statutes which exclude the survivors' testimony altogether.<sup>60</sup> Where, in fact, there is corroborating evidence, there would be no problem. However, in the case where the survivor and the decedent were the only witnesses to the transaction, such a requirement appears to be open to the same objection levelled against total disqualification of the survivors' testimony. Whether or not the legislature would see fit to impose such a requirement will depend on its best estimate of the goodness or perversity of human nature. Such an approach, however, at the very least, creates a common meeting ground with those who are convinced that the rationale of the rule of total exclusion is sound, and might well open the door to a more enlightened rule than that which exists in Wisconsin today.

BERNARD P. BERRY

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<sup>59</sup> See 7 WIGMORE, *supra* note 1, §2065 n. 5 where the statutes are collected.

<sup>60</sup> *Id.* at 374-375.